

1-1964

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### Recommended Citation

Jack Leavitt, *The Funeral Director's Liability for Mental Anguish*, 15 HASTINGS L.J. 464 (1964).

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# The Funeral Director's Liability For Mental Anguish

By JACK LEAVITT\*

FAULTY BURIAL arrangements once provided joy to two Irish murderers who, instead of being hanged as the court had ordered, were set free because his honor's death sentence failed to specify that their bodies should be buried within the jail precincts.<sup>1</sup> Far more common to necrological annals, however, are the shock, dismay, and emotional upsets that accompany bungling or sharp practices in the commercial rites by which a corpse briefly poses as a status symbol. Since death is so expensive a venture—not only do many wraiths abandon all hope in their new environment, but their survivors pay an average of \$942 per funeral<sup>2</sup>—the legal implications of an improperly carried out funeral

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<sup>1</sup> *Queen v. Hartnett*, Jebb C.C. 302 (1840).

<sup>2</sup> MITFORD, *THE AMERICAN WAY OF DEATH* 39 (1963), hereafter cited as MITFORD and highly recommended. Miss Mitford states that Americans in 1960 spent approximately \$1.6 billion on funerals, excluding burial expenditures by private or public organizations for indigents or by the armed forces for military personnel. Some years earlier, George Bernard Shaw had *The Devil* observe, "I saw a man die: he was a London bricklayer's laborer with seven children. He left seventeen pounds club money; and his wife spent it all on his funeral and went into the workhouse with the children the next day. She would not have spent sevenpence on her children's schooling: the law had to force her to let them be taught gratuitously; but on death she spent all she had. Their imagination glows, their energies rise at the idea of death, these people; they love it, and the more horrible it is the more they enjoy it." SHAW, *Man and Superman*, in *SEVEN PLAYS* 620 (1951). Cf. *Terrill's Adm'r v. Davis*, 303 Ky. 758, 199 S.W.2d 130 (1947), which approved a \$1,600 funeral claim against a net estate of \$16,000 even though the decedent had left written instructions that, "My body is to be cremated and ashes thrown to the wind." Dealing with arguments that the charges were excessive because only \$496 went towards burial, *i.e.*, casket, vault, and embalming, the court said it was customary for undertakers to charge to each funeral, under the item "services," a

agreement deserve our attention. What is it that the aggrieved family actually buys in these transactions? Underground novelties?<sup>3</sup> A casket lining made of pure silk because "we find rayon is a lot more irritating to the skin?"<sup>4</sup> A corpse pumped so efficiently with Cosmetic Tru-Lanol Arterial Fluid that the embalmer says, "I wish I could have kept her for four more days?"<sup>5</sup> Or is it, perhaps, what the funeral directors have insisted on:

The PROTECTIVE PLAN does *not* offer cut-rate bargain-basement funerals; *only complete peace of mind*, built on over three-quarters of a century of understanding service!<sup>6</sup>

\* \* \* \*

Four generations of Bay Area families have turned to this pioneer Mortuary in their time of need. Here they find friendliness combined with capability—so important to a fitting Memorial.<sup>7</sup>

\* \* \* \*

In his care of each subject, the embalmer has a heavy responsibility, for his skill and interest will largely determine the degree of permanent mental trauma to be suffered by all those closely associated with the deceased.<sup>8</sup>

Whether or not morticians can provide medical authority to show that their grief therapy brings mental and emotional solace to bereaved families or that the Beautiful Memory Picture of lifeless remains doused by soft lights has psychological value in the therapy of mourn-

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percentage of the general overhead, such as salaries, wages, rents, automobiles, light, water, fuel, and office supplies. See also *Regina v. Vann*, 2 Den. 322, 169 Eng. Rep. 523 (1851), which reversed a pauper's conviction for maintaining a common nuisance that came about because, rather than obligate himself for high burial costs, he left his child's body in a neighborhood yard. According to the Chief Justice, a man need not incur a debt for burial and thereby take away the means of maintaining his family.

<sup>3</sup> "I happened to pick up the business card of a local undertaker, which said 'Bember Brothers, Morticians and Embalmers.' In the lower right-hand corner, in smaller type, they had printed 'Underground Novelties!' I carried that damned little card around with me for many years, for I never got over puzzling about those Underground Novelties. What could they have possibly furnished you? Ice water? Intergrave telephone service? Or what?" KING, *MINE ENEMY GROWS OLDER* 96 (Signet ed. 1960).

<sup>4</sup> Mitford, *Americans Don't Want Fancy Funerals*, Saturday Evening Post, November 23, 1963, p. 8.

<sup>5</sup> MITTFORD 223.

<sup>6</sup> From an advertisement in the San Francisco Examiner, Jan. 25, 1964, p. 16, cols. 5-6, which adds that, on request, details about this promised peace of mind will be mailed promptly in a plain wrapper. (All emphasis is in the original.)

<sup>7</sup> From an advertisement in the Oakland Tribune, Jan. 26, 1964, p. 29, cols. 1-2, which adds that the "prestige" of this service costs no more.

<sup>8</sup> Quoted from an unidentified embalming textbook in MITTFORD 90.

ing, these graveside entrepreneurs act less for redemption of the dead than comfort of the living.<sup>9</sup> Primitive burial customs, like that of burying the dead inside their own homes, may have been reverently designed to insure reincarnation of the deceased in favorable surroundings,<sup>10</sup> but our current religious precepts demand few, if any, of the secular trappings so rampant today. Salvation, alas, requires more than the hiring of a licensed undertaker.<sup>10a</sup>

We should recognize that the corpse in a modern American funeral serves primarily as a viaduct conducting sympathy, good will, and prestige towards the leading mourners. These emotional outpourings are the real objects of the agreement between the survivors and the funeral director, even though their discussion may refer only to items like "one \$647 casket," "30 minutes of organ music," or "use of the main slumber room for three days." Consolation being the aim, what else would result from a breach of the agreement but mental anguish? Is it proper, for example, to hold that parents' only legal damage from a cremation society's loss of their dead child's ashes is \$12, the cost of the urn and its storage?<sup>11</sup> Or that parents cannot maintain an action against an undertaking firm for refusing, after a collision between the hearse and a railroad train, to gather up the young decedent's scattered remains and preserve them for humane burial?<sup>12</sup> Or that a widow could recover only the contract price she paid to an undertaker who so negligently prepared her husband's body for shipment that when it arrived it was decomposed, giving off such an offensive odor that the casket had to be left in the open air during the funeral ceremonies?<sup>13</sup>

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<sup>9</sup> MITFORD, 90-95 & *passim*.

<sup>10</sup> 1 FRAZER, *THE GOLDEN BOUGH* 101-05 (3d ed. 1911; 1955 reprint). "Primitives," of course, vary as much in their attitude towards the dead as do "moderns." In Africa, for example, a native chief agreed to have his mother's dead body poisoned and left near a man-eating lion's trail. When the beast was found dead the next day, lying poisoned across the woman's body, a British ranger assured the chief, "The government will now see that the remains of your mother will receive the best possible interment. No expense will be spared." The chief answered, "Well, I hate to see the old lady wasted like that. We've been having a lot of trouble with hyenas lately. Let's leave her out another few nights and see if she can't get some hyenas." HUNTER, HUNTER 158 (Bantam ed. 1955).

<sup>10a</sup> See N.Y. Times, Sept. 3, 1963, p. 35, col. 8 for a lengthy article in which clergymen of the three major faiths demanded a curb on the neo-pagan corpse worship of the modern funeral. *But cf.* the reply of the president of the National Funeral Directors Association who said clergymen have highly praised undertakers and that "The people of our country are satisfied with their funeral director and his practices." N.Y. Times, Sept. 13, 1963, p. 31, Col. 8. See also N.Y. Times, Oct. 17, 1963, p. 71, col. 2 for a Methodist cleric's defense of the modern funeral.

<sup>11</sup> See *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172 (1918).

<sup>12</sup> See *Nail v. McCullough & Lee*, 88 Okla. 243, 212 Pac. 981 (1923).

<sup>13</sup> See *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913).

Yet many courts refuse to consider mental suffering, unaccompanied by physical injury, as a valid claim against a funeral director who negligently breached his contract. In this article, I hope to demonstrate that those courts have misconceived the difference between "contract" as the formalization of legal relationships and a *particular* contract made up of specific obligations, and that once this difference is acknowledged a funeral director's negligence will subject him to liability for all the harm occurring within the contracting parties' original contemplation, including (and especially) "pure" mental suffering.

Establishing this proposition will take us from a discussion of legislative controls over the funeral industry, through intentional violations of funerary obligations, to negligent breaches of funeral contracts. Throughout this analysis, the only conduct to be reviewed is that which provoked lawsuits and which, presumably, characterizes a minority of funeral directors. As a group, undertakers object to characterizations which portray them as "ruthless, cunning, greedy, cutthroat, fraudulent, vulturous, deceitful, overbearing hucksters of grief" whose goal is to "capitalize on the sadness, sorrow, vulnerability and bereavement of a decedent's family" through activities that include "criminal conduct, punishable by fine, jail and license revocation."<sup>14</sup>

In fairness to the trade, we should remember that we too often suspect those who profit from our misfortunes, be they attorneys, physicians, or funeral directors, as in some way the original cause of the misfortune. We have the right, under present commercial transactions, to expect a funeral director to assuage grief, but we dare not blame him for failing to prolong life.

### *Legislative Regulation*

Because the funeral industry is so intimately connected with the public welfare through society's concern for the dead, the business operations of funeral directors and embalmers are subject to legislative control under the state police power.<sup>15</sup> The extent of this control varies

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<sup>14</sup> The Los Angeles Funeral Directors Association, disturbed by a fictional telecast, recently petitioned the Federal Communications Commission for equal time to answer such implications. See The San Francisco Examiner, Jan. 7, 1964, p. 37, cols. 7-8.

<sup>15</sup> See, e.g., CAL. BUS. & PROF. CODE §§ 7600-11; 16 CAL. ADM. CODE § 1221; Memorial Gardens Ass'n, Inc. v. Smith, 16 Ill. 2d 116, 156 N.E.2d 587 (1959), which requires "pre-need" burial payments to be treated as trust funds and is similar in purpose to 33 OPS. CAL. ATT'Y GEN. 167 (1959).

As used in this article, "funeral director," "undertaker," and "mortician" are interchangeable words, referring to a person, partnership, association, corporation, or other organization engaged in preparing, directing, and supervising the burial or disposal of dead human bodies, and maintaining a funeral establishment for these purposes. See CAL. BUS. & PROF. CODE § 7615. "Embalmer" refers to one qualified to disinfect or

among the many jurisdictions but is based on concern with public health and possible concealment of crime,<sup>16</sup> and on a legislative insight that when emotions are strong the undue commercialization of death should be avoided.<sup>17</sup> Regardless of whether mortuary activities are considered a business or a profession, or both, the state may require minimum qualifications from its practitioners (such as graduation from a prescribed school<sup>18</sup> and passing of a written examination<sup>19</sup>) and may determine the physical components of the funeral establishment (such as having the business office, display room, preparation room, and chapel at the same location).<sup>20</sup>

Legislatures recognize the special dignity, decency, and honor associated with the ceremonies of death and may demand appropriate qualities in the men who perform these rites. Against a funeral director's objections that "unprofessional conduct" had not been defined and thus could not sufficiently warn him of what activities to avoid—in his case consisting of failure to pay another funeral director money received for that purpose; of increasing a funeral bill, after a price agreement had been reached, because he discovered the decedent's life insurance was greater than he had known; and of receiving nearly all of a 72 year old woman's life savings for a prearranged funeral, on the false inducement that he could help her get an old age pension—in answer, a court has declared:

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preserve dead human bodies by the injection or external application of antiseptics, disinfectants or preservative fluids; to prepare bodies for transportation after their deaths by contagious or infectious diseases; and to use derma surgery or plastic art for restoring mutilated features. See CAL. BUS. & PROF. CODE § 7640.

In the fiscal year 1962-63, California recognized the licenses of 797 funeral directors (which in this instance refers to the funeral establishment, rather than the individual practitioner), 2,870 embalmers, and 567 apprentice embalmers. During that period, this group was subjected to 89 official complaints and investigations, and 40 hearings. See BD. OF FUNERAL DIRECTORS & EMBALMERS, ANNUAL REPORT (fiscal year 1962-1963).

<sup>16</sup> See *State v. Rice*, 115 Md. 317, 80 Atl. 1026 (1911); *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910).

<sup>17</sup> See *Drummey v. State Bd. of Funeral Directors & Embalmers*, 13 Cal. 2d 75, 87 P.2d 848 (1939); *Prata Undertaking Co. v. State Bd. of Embalming & Funeral Directing*, 55 R.I. 454, 182 Atl. 808, 104 A.L.R. 389 (1936); *Mashburn v. State Bd. of Funeral Directors & Embalmers*, 132 Cal. App. 2d 126, 281 P.2d 577 (1955).

<sup>18</sup> See *Walton v. Commonwealth*, 187 Va. 275, 46 S.E.2d 373 (1948) (dicta), which actually held that an undertaker not licensed in Virginia, though licensed in Tennessee, did not unlawfully practice the trade in Virginia by conducting one funeral there. In California, only two schools of mortuary science are approved, one in San Francisco, one in Los Angeles. See CAL. STATE BD. OF FUNERAL DIRECTORS & EMBALMERS, INFORMATION LETTER (undated).

<sup>19</sup> CAL. BUS. & PROF. CODE § 7622; 14 OPS. CAL. ATT'Y GEN. 111 (1949).

<sup>20</sup> 21 OPS. CAL. ATT'Y GEN. 18 (1953).

To define, by a set of rules and regulations, the manner in which these delicate requirements shall be met, would appear quite difficult of accomplishment, though it might be done. But these requirements are easily recognized when met, and their absence is glaring to the trained eye and mind and shocking to all the finer sensibilities of men.<sup>21</sup>

To prevent funeral directors from taking unfair advantage of their patrons at a time when the prospective buyers are in no condition to withstand pressure, the state may prohibit solicitation of business while death is impending or has recently occurred.<sup>22</sup> Despite claims that a state board has no legal authority to control an undertaker's securing of business and that the board may inquire only into the proper care and disposition of dead human bodies, the entire operation of the business is what the legislature intends to regulate. No conduct is more objectionable than the use, at a charity hospital, of "cappers" or "steerers" who watch the list of dangerously ill patients and, on death, immediately contact the decedent's family to solicit the business of burying the corpse. These actions "bring to mind the vulture hovering over the dying animal preparatory to swooping down upon it as soon as the breath leaves its body."<sup>23</sup>

<sup>21</sup> *Pierstoff v. Board of Embalmers & Funeral Directors*, 68 Ohio App. 453, 456, 41 N.E.2d 889, 891 (1941). In *Beatty v. State Bd. of Undertakers*, 352 Pa. 565, 43 A.2d 127 (1945), the court said that a definition of "misconduct" is within the board's discretion and may consist of the breach of any generally accepted canon of ethics and propriety governing the respectful and reverential burial of the dead. See also *Cooley v. State Bd. of Funeral Directors & Embalmers*, 141 Cal. App. 2d 293, 296 P.2d 588 (1956); *People v. Ackley*, 270 App. Div. 958, 62 N.Y.S.2d 771 (1946), a criminal conviction affirmed in 296 N.Y. 731, 70 N.E.2d 544 (1946); *Daggett v. State Bd. of Funeral Directors & Embalmers*, 44 Cal. App. 2d 742, 112 P.2d 956 (1941). The suspended funeral director in *Cooley*, *supra*, unsuccessfully blamed a rush of business for such conditions in his preparation room as maggots coming from a decomposing infant's body, scattered filth throughout the room, and one dead body stacked on top of another body.

<sup>22</sup> *Drummey v. State Bd. of Funeral Directors & Embalmers*, 13 Cal. 2d 75, 87 P.2d 848 (1939).

<sup>23</sup> *Louisiana Undertaking Co. v. Louisiana State Bd. of Embalmers*, 58 So. 2d 303, 305 (La. Ct. App. 1952). Funeral directors seem to be at odds over whether a more common type of solicitation, that of advertising by stating prices, is proper for the trade. See *Grissom v. Van Ordsell*, 137 So. 2d 246 (Fla. Ct. App. 1962), which held that undertaking is a business rather than a profession and that, in consequence, restrictions on advertising went beyond the board's power to protect the public peace, health, safety, welfare, and morals. Miss Mitford said of the contending forces in that litigation—which included newspapers offering editorial support for the right to advertise—"Seldom have appeals to principle so transparently cloaked self-interest." MITFORD 239. *But cf. Queensbury v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956), which declared that board rules prohibiting price advertising were valid. Since newer businesses are more likely to need such advertising, we should note that, except for the state health director, the members of the West Virginia board which promulgated this rule were all licensed funeral directors and embalmers having at least five consecutive years of experience in that state.

As the key process in modern funerary practices, embalming has sometimes inspired more legislative and administrative action than courts have upheld as valid controls in the public interest. Undertakers regularly insist that embalming is an essential hygienic measure, beneficial to the public and a necessary qualification for hopeful practitioners of the trade. But even in 1909 the Massachusetts Judicial Court could strike down a board of health rule which made an embalming license a prerequisite to an undertaking license, because the rule was unwarranted, improper, and illegal. Mentioning that "no argument" had been made to show that general embalming was necessary to preserve the public health and that the court knew of no such necessity, the court said:

*Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. . . . The only particular in which the respondents have suggested . . . that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. . . . No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But if there may be some slight increase of knowledge, from this source, to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation.<sup>24</sup>*

The stress on statutory imperatives about embalming was perhaps a simple business tactic with which established morticians harassed prospective competitors,<sup>25</sup> but the commercial popularity of the preservative art has a somewhat different financial warrant. What it does

<sup>24</sup> *Wyeth v. Thomas*, 200 Mass. 474, 479-80, 86 N.E. 925, 927-28 (1909) (emphasis added). *Accord*, *State v. Rice*, 115 Md. 317, 80 Atl. 1026 (1911); *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910). *But cf.* *State Bd. v. Cooksey*, 147 Fla. 337, 3 So. 2d 502 (1941), which states at 3 So. 2d 506: "When we consider the service which a funeral director is required to render to the public and the duty which he owes to the public to see that that service is properly, efficiently, honestly and promptly rendered, we can find nothing unreasonable or unwarranted in the statutory requirement that each funeral director shall be a licensed embalmer." See also *MITTFORD* 81-90 for further evidence that embalming has little, if any, public health functions.

<sup>25</sup> See *People v. Ringe*, 197 N.Y. 143, 151, 90 N.E. 451, 454 (1910), which observed, "We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals, and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."



is make possible drawn-out mortuary proceedings at maximized cost.<sup>26</sup> By emphasizing an expensive process that has no hygienic values, the funeral industry, willingly or not, has placed itself in a position of admitting to near-fraud in its marketing practices or of justifying its sales activities as capable of serving its customers' emotional needs. Once emotional health is acknowledged as the "special reason" for modern funeral arrangements, a breach of that agreement should create liability commensurate with the parties' original purpose.

### *Liability for Intentional Acts*

Courts are often ready to award an individual compensation from a party who has deliberately injured him, commonly ruling that acts which are legally unassailable if performed under certain conditions become charged with liability when intentionally done. At the turn of the century, Bigelow illustrated this principle by stating:

A workman on a house might negligently let a stick fall at my feet, as I was passing along the street, and if, though startled, I was not hit, the workman probably would not be liable for the act; but if he threw the stick at me, with the same result, he would be liable, for passion would instinctively be aroused to redress.<sup>27</sup>

As applied to actions seeking damages for mental distress, however, the principle became clouded because the action itself was viewed suspiciously. Courts sometimes felt there are "many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation."<sup>28</sup> Lacking more refined methods of granting legal relief, those courts denied recovery even to plaintiffs who might have welcomed the coarse palliative of money damages. Such fine distinctions peppered the law that the Indiana Supreme

<sup>26</sup> MITFORD *passim*.

<sup>27</sup> BIGELOW, TORTS 28 (7th ed. 1901) (citations omitted). Bigelow notes another reason for this distinction, namely that an intended wrong is more likely to do harm than one not intended. See also *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963), which states as dicta that increased liability for intentional acts reflects the psychological fact that solicitude for the actor's interests weighs less in the balance as his moral guilt increases and the social utility of his conduct diminishes.

<sup>28</sup> *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S.E. 901, 904 (1892) Cf. *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913), which states that if people generally believe in recovery for certain kinds of mental suffering they should secure an appropriate law by initiative or legislative enactment. "Such a law could define what cases should be considered within the doctrine, and definitely fix the amount recoverable. The jury and courts would thus be relieved of the unpleasant duty of trying to measure in dollars and cents the degree or extent of mental suffering in such cases." *Id.* at 238, 134 Pac. at 155. For an enactment along parallel lines, see THE CODE OF HAMMURABI (ca. 2600 B.C.). See also text at notes 74-83.

Court could explain "not one cent" would be recovered for a plaintiff's mental agonies while a train bore down on him as his foot lay caught in the track, but he could obtain damages for the mental anguish resulting from his having to go through life a cripple.<sup>29</sup>

Battered by these precedents, the cause of action for emotional distress due to improper handling of the dead contains futile distinctions galore but may be roughly categorized as follows: many jurisdictions bar recovery if the dereliction amounts to no more than a negligent breach of contract, though others permit this litigation;<sup>30</sup> many jurisdictions (often the same ones which reject a negligence basis) allow compensation if the wrongful act was wilful or wanton or amounted to gross negligence;<sup>31</sup> and in all jurisdictions the damages are apparently available following commission of a tort which can support an action for some damages and includes mental suffering as a natural and probable result.<sup>32</sup>

The plaintiff's first hurdle is in establishing himself as possessed of some right that could have been violated. Under early English law, an heir had a property interest in his ancestors' escutcheons and grave-side monuments, and the decedent's executor or some other person in charge of the funeral had property in the shroud, though the cadaver itself was regarded as *caro data vermibus*—flesh given to worms—and treated as being no person's property.<sup>33</sup> American courts, however, recognized that those entitled to possess the body for burial had rights visualized as being property in its broadest and most general sense, *i.e.*, something over which the law gives exclusive control,<sup>34</sup> and that the right of exemption from wrongful acts affecting this interest is itself the property.<sup>35</sup> Since the next of kin have the right and the duty to give the remains a Christian burial, a duty "which loving hands perform as a privilege," interference with the mourners is actionable.<sup>36</sup>

<sup>29</sup> *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N.E. 674 (1901) (dicta).

<sup>30</sup> See text at notes 67-104.

<sup>31</sup> See *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10 (1950); *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913).

<sup>32</sup> *Ibid.*

<sup>33</sup> See 3 COKE, INSTITUTES \*203 (1628); 2 BLACKSTONE, COMMENTARIES \*429 (1766). Stealing a shroud was felony, but stealing a corpse was not (though it was a high misdemeanor). See 3 CHITTY, CRIMINAL LAW \*948 (1832).

<sup>34</sup> *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891).

<sup>35</sup> *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905).

<sup>36</sup> *Louisville & N. R.R. v. Hull*, 113 Ky. 561, 571, 68 S.W. 433, 435 (1902); *Wright v. Hollywood Cemetery Co.*, 112 Ga. 884, 38 S.E. 94 (1901) (where the interference was unlawful and unwarranted). *But cf.* *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900), which denied recovery to a father who suffered no injury of any kind save to his feelings, stating that the father's grief was not an exception to the rule that mental distress alone is too remote and difficult of measurement to justify an award of

The survivors' rights can be summed up as encompassing a right to custody of the dead body; to having the body in its condition at death, without mutilation; to having it treated with decent respect, without outrage or indignity; and to be able to bury it without interference.<sup>37</sup>

Criticism has been directed against the need to discover (and in effect create) an independent tort, such as *trespass quare clausum fregit* to a plot in a graveyard, to sustain an action for injury to feelings, like a father's grief because his son's body was wrongfully disinterred and reburied in a charity lot in a grave containing two other bodies. According to an Illinois court, "The mind instinctively revolts at the mere suggestion that any well ordered system of jurisprudence should find it necessary to resort to so flimsy a subterfuge in order to sustain a recovery of substantial damages for such a tort, when wilfully or wantonly committed."<sup>38</sup> Even so, the existence of a primary tort has been useful to plaintiffs complaining about mutilation, improper detention, or similar acts.

Courts treat unauthorized autopsies or post-mortem examinations, though done in the name of science, as wilful mutilation of a corpse, subjecting those who performed the operation to liability for a survivor's emotional distress.<sup>39</sup> A funeral director need not fear liability

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damages. What happened in *Gatzow, supra*, was this: the defendants, members of a liveryman's association, objected to the activities of the undertaker conducting the child's funeral, for he paid lower wages than the association tolerated. Accordingly, as the funeral services for the plaintiff's child ended and the pallbearers were about to place the coffin in the hearse, the drivers of the hearse and carriage, on instructions, sped off in their vehicles and left the father to make what new arrangements he could.

<sup>37</sup> See *Infield v. Cope*, 58 N.M. 308, 270 P.2d 716 (1954). See also *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10 (1950); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950); *Sworski v. Simmons*, 208 Minn. 201, 293 N.W. 309 (1940); *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917).

Ordinarily the surviving spouse or next of kin in order of testamentary succession is the proper person to assert these rights. See, e.g., *Edwards v. Franke*, 364 P.2d 60 (Alaska Sup. Ct. 1961), which denied recovery for mental anguish because the complaining party was the decedent's common law, rather than licensed, husband; *Teasley v. Thompson*, 204 Ark. 959, 165 S.W.2d 940 (1942), which allowed a married woman's mother to bring the action since the surviving husband had not manifested the slightest interest in the decedent's welfare; *Floyd v. Atlantic Coast Line Ry.*, 167 N.C. 55, 83 S.E. 12 (1914), which held that a mother lacked standing to sue for the negligent mutilation of her son's body, since it was the father's right to recover. *Floyd, supra*, was decided in spite of a dissent which said: "Great nature tells us that her suffering [for the indignity to the body of her son] is something apart from and usually greater than that of her husband." *Id.* at 63, 83 S.E. at 15.

<sup>38</sup> *Mensinger v. O'Hara*, 189 Ill. App. 48, 52 (1914), commenting on *Meagher v. Driscoll*, 99 Mass. 281 (1868). *Accord*, *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891).

<sup>39</sup> See *Alderman v. Ford*, 146 Kan. 698, 72 P.2d 981 (1937); *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Phillips v. Newport*, 28 Tenn. App. 187, 187 S.W.2d 965 (1945); *Palenzke v.*

if, on reasonable grounds that the autopsy was proper, he simply furnished a room for its performance. He does not become liable in tort just because the unintended effect of his lawful act helps someone else accomplish a wrong.<sup>40</sup> But he must answer in damages if, on the pretense that his operations were necessary for embalming purposes, he cuts open a child's body, removes its liver and stomach, and covers the body with a sheet to prevent the mother from seeing its post-operative condition. It is a deliberate violation of a mother's rights to increase her already great grief at the child's accidental death by burdening her with the fact that the child's body was completely opened and its vital organs cut loose, removed, and then replaced.<sup>41</sup>

Mutilation also occurs, so as to justify an award for mental anguish accompanying indignity, insult, and humiliation, when undertakers receive the body of a woman who had "a beautiful head of hair, very thick and of great length," and, by cutting off the hair, render the body unfit for viewing by her husband, relatives, and friends. The cutting required a physical effort, intentionally performed, which could have been accomplished only by design: a large and heavy head of hair cannot be removed by mere neglect. Evil intent is not necessary; wilful misconduct is enough.<sup>42</sup> Nonetheless, a husband who wished to remember many years of happy association in marriage has no cause of action for mental suffering from the disturbance of his wife's body if the malice he alleges can be treated as a pleader's whim. The husband's complaint charged that he gave full and specific instructions to a funeral home to have a diamond ring, wedding band, and wrist watch buried with his wife's body, but that a vice-president of the firm, acting after the relatives and friends had left the grave, raised the casket lid and

reached in the said casket with his hands and took hold of the left hand and arm of said decedent, and after having raised said left hand

Bruning, 98 Ill. App. 644 (1900); *Foley v. Phelps*, 1 App. Div. 551, 37 N.Y.S. 471 (1896).

<sup>40</sup> *Konency v. Hohenschuh*, 188 Iowa 1075, 173 N.W. 901 (1919). See also *Sturgeon v. Crosby Mortuary, Inc.*, 140 Neb. 82, 299 N.W. 378 (1941).

<sup>41</sup> *Phillips v. Newport*, 28 Tenn. App. 187, 187 S.W.2d 965 (1945). See also *Foley v. Phelps*, 1 App. Div. 551, 555, 37 N.Y.S. 471, 474 (1896), which says that a surviving widow has "the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative."

<sup>42</sup> *Mensinger v. O'Hara*, 189 Ill. App. 48 (1914). Cf. *Perati v. Atkinson*, 213 Cal. App. 2d 472, 28 Cal. Rptr. 898 (1963), an entirely different factual context, which said that intentional infliction of emotional harm without physical trauma can be a ground of liability, but only when the defendant's conduct is outrageous or has gone beyond all reasonable bounds of decency. Where physical harm has not resulted from the emotional distress, explained the decision, courts tend to look for more in the way of extreme outrage as an assurance that the claimed mental distress is not fictitious.

and arm by vigorous jerks which caused the entire corpse of said decedent to quiver and shake, forcibly and wrongfully removed said diamond ring and wedding band and wrist watch from the left hand and arm of said decedent's body.<sup>43</sup>

Affirming a judgment on the pleadings in favor of the funeral home, an Ohio court said:

It is obvious that removing the rings and watch did not disturb the corpse any more than did putting them on. Slight indeed must have been the quiver and shake of the body in doing either. This is far from the type of cases cited by plaintiff where the dead bodies were mutilated or otherwise desecrated. It is not claimed the body was even scratched or its position in the casket changed. The most that can be said of the acts of the defendant, from plaintiff's standpoint, is that they violated the instructions given defendant and thereby breached its contract with respect to burying the body with the jewelry on it.<sup>44</sup>

This reasoning, I think, cannot be coped with on an analytic level. Unless the court's own words convince a reader of their folly, no outsider's arguments will prod him towards that goal. We should understand, however, that the court was functioning in a jurisdiction which forbade recovery for mental suffering unaccompanied by bodily injury unless the defendant's acts were done maliciously. Placing an aggrieved party in such a position, where he must find some way of showing a legal concept, *i.e.*, malice, as a fact rather than a conclusion of law, or must suffer some physical harm to preserve his rights to emotional equilibrium, not only clashes with the general principle of minimizing damages but encourages "legal maladies" like a near-simultaneous occurrence of emotional shock, fainting, and bruising from the resultant fall to the ground.<sup>45</sup> We have, in myth at least, such liability-conscious

<sup>43</sup> *Grill v. Abele Funeral Home, Inc.*, 69 Ohio App. 51, 52, 42 N.E.2d 788 (1940).

<sup>44</sup> *Id.* at 53, 42 N.E.2d at 789. *Cf.* *People v. Bullington*, 27 Cal. App. 2d 396, 80 P.2d 1030 (1938), a criminal case which reversed an embalmer's conviction of feloniously mutilating a dead body by removing two gold crowns from the decedent's teeth. The trial court had erroneously taken the position that removal of the crowns from the natural teeth to which they had been cemented constituted mutilation as a matter of law. In so doing, the court improperly used the definition of "mutilate" that is applied to books and manuscripts, rather than to the human body.

<sup>45</sup> See, *e.g.*, *Clemm v. Atchison, T. & S.F. Ry.*, 126 Kan. 181, 268 Pac. 103 (1928), where the fainting spell probably was an honest one occurring when the plaintiff learned her husband's body had not been carried on the proper train. The court observed that the widow's fright, terror, grief, shock, and fall with resulting physical injuries were substantially simultaneous, and resulted naturally and directly from the railroad's negligence. "To say that the mental anguish preceded the physical injuries by a second or two, and therefore that there is no liability for either, is to make too much of a refinement for practical purposes, and one that would tend to defeat justice rather than promote it." *Id.* at 183, 268 Pac. at 106. *Cf.* *Espinosa v. Beverly Hospital*, 114 Cal. App. 2d

citizens that the victim of a rear-end collision, when approached by his first rescuer, is likely to say, "It hurts right between the seventh cervical and first dorsal vertebrae. Clearly a whiplash." Why should we demand extensions of this native readiness to conform to court ritual by asking plaintiffs for anatomical certainty of where they hurt? Given facts which establish the likelihood of emotional distress, we should determine its existence on the basis of a plaintiff's credibility rather than abrasions.

Proof of circumstances showing an utter disregard for the feelings of a surviving family has been held sufficient to justify actual damages, even though no evidence is offered to establish the mental anguish. When the survivors prove that an undertaking firm fraudulently substituted a cheaper coffin for the one ordered, charged for a robe that was never delivered, and buried the decedent in a coffin so small his arms and legs extended outside the box, the defendant cannot excuse himself by claiming that all undertakers did business that way and he acted to keep even.<sup>46</sup> Fraudulent reburial of a corpse without casket, case, or shroud, only a few inches below ground surface, after the surviving wife had contracted for proper transfer of the remains to a new cemetery, also sustains recovery for mental anguish resulting from the undertaker's misrepresentations and gross negligence. Said the court:

It is a matter of common knowledge that near relatives, irrespective of race, color, or creed, have the tenderest feelings and emotions for the remains of their dead. From the nature of his calling and experience, the defendant was especially aware of this. He knew, or ought to have known, that the plaintiff, the widow of the dead man, would naturally and probably suffer mental anguish if he were neglectful of the contract which he had made with her, or inflicted indignities upon the remains of her husband.<sup>47</sup>

No protection is afforded an intermeddling undertaker who insists that the embalming job he performed was beneficial and necessary,

232, 249 P.2d 843 (1953), which denied recovery for parents' mental anguish at having been given the wrong newly-born infant to take home from the hospital. The court said that if the wrong delivery had produced such an impact on the nervous system as to cause physical injuries, the parents could recover for the physical injuries, plus mental suffering, anxiety, and loss of sleep. Unfortunately for the parents, the mother's severe back pain, stomach pain, and overall aches were not considered a sufficient enough injury on which to attach liability.

<sup>46</sup> *J. E. Dunn & Co. v. Smith*, Tex. Civ. App., 74 S.W. 576 (1903). See also *Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927).

<sup>47</sup> *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10, 14 (1950), which, though arising out of a breach of contract, was treated as a tort action. See also *Spomer v. City of Grand Junction*, 144 Colo. 250, 355 P.2d 960 (1960); *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 33 S.E. 853 (1899). But cf. *Norton v. Kull*, 74 Misc. 476, 132 N.Y.S. 387 (1911).

if he had failed to secure the prior approval of the decedent's known relatives. Although embalming is generally recognized as a proper service, the parents of a son who committed suicide are the only ones entitled to authorize this service. To say that the parents had the body embalmed later is no defense, for the subsequent embalming cannot wipe out the cause of action for mental suffering arising from the wanton and callous disregard of the parents' rights.<sup>48</sup> This principle has been undercut when malice is essential to uphold the action for mental pain. An undertaker may then be spared from liability if he shows that he followed the coroner's instructions in removing a suddenly-stricken person from a physician's office to his own establishment, that the surviving wife's whereabouts were generally but not specifically known, and that he released the body to another funeral home on the wife's request as soon as the embalming process had ended.<sup>49</sup> Perhaps these contrasting positions should be reconciled in this way: The survivor has a right to obtain the body in its condition at death. Unless an undertaker has received the corpse from someone who apparently represents the family's interests,<sup>50</sup> he cannot excuse himself

<sup>48</sup> *Sworski v. Simmons*, 208 Minn. 201, 293 N.W. 309 (1940), in which three judges dissented because of the undertaker's reliance on the coroner's actual or apparent authority. See also *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950).

<sup>49</sup> *Kimple v. Riedel*, 133 So. 2d 437 (Fla. Ct. App. 1961). *Cf. Hale v. Brown*, 84 Ariz. 61, 323 P.2d 955 (1958), where the gist of the surviving wife's unsuccessful action appeared to be a complaint about the *time* of embalming, rather than its wrongfulness. She alleged a conspiracy between the morticians and her deceased husband's employer to wrongfully embalm her husband's body and thus suppress evidence as to the cause of his death. By a 3-2 vote, summary judgment in the defendants' favor was affirmed, the court majority asserting that the wife never showed in what particular the wrongful act caused her mental anguish. The dissenters insisted that wrongful embalming is a wilful tort, actionable per se, for nominal damages at least, and that the wife was not required to allege how the wrongful act led to her mental anguish.

<sup>50</sup> Disputes do arise over which persons have authority to make funeral arrangements and which must pay the bill. See *Terril's Adm'r v. Davis*, 303 Ky. 758, 199 S.W.2d 130 (1947), which held that the decedent's brother had such authority because "A person is entitled to a Christian burial, and it cannot be delayed to determine upon whom the legal obligation to proceed with the burial rests most heavily, nor should the undertaker be compelled to await an adjustment of any dispute that might arise." *Id.* at 761, 199 S.W.2d at 132. See also *H. M. Patterson & Son v. Payne*, 90 Ga. App. 699, 83 S.E.2d 841 (1954), which relieved a surviving husband, who had lived apart from his deceased wife, from liability for funeral arrangements which the wife's sister had made and to which the husband had simply given consent. See also *Jones v. Caine*, 222 N.Y.S.2d 563 (N.Y. Police Ct. 1961), which observed that at the time of death the immediate family is usually so emotionally upset that they are practically useless in making funeral arrangements. "About the only one who has his complete wits about him is the undertaker." 222 N.Y.S.2d at 565. But usually one person, an uncle, aunt, or friend, takes control of the arrangements and becomes the family leader. Generally he has no intention of being liable for the funeral expenses, but he may intend to accept liability; this intention, however, must be clearly spelled out before a funeral director

for the effects on the survivor of his wrongful embalming by asserting that undertakers customarily do not bother to obtain family authorization.<sup>51</sup> But he should, for example, be allowed to establish that decomposition of the body had already set in, summertime weather was hastening the decay, and his acts were designed to preserve the body in its best possible form to serve the interests of an unknown or unreachable survivor.<sup>52</sup> A funeral director who acts reasonably and successfully to prevent a known harm should not be penalized for his technical trespass in performing the work, nor for a survivor's later-disclosed preference in favor of the averted harm.

Some funeral directors have used dead bodies as collateral security to enforce payment of their bills, bringing to mind the biblical dispute between Michael and the Devil about the body of Moses, "though the record does not disclose whether such contentions arose over the possession of the body for burial."<sup>53</sup> What has arisen in various records, however, are histories of a shocked widow having to spend an hour or two in the mid-morning haggling and bartering with an undertaker for the body of her husband, which the undertaker refused to release unless she immediately paid his bill for an unauthorized embalming;<sup>54</sup> of a mother being unable for days to reclaim the body of her five year old child, which a funeral establishment had wrongfully obtained after the child was accidentally shot and killed;<sup>55</sup> of a mother being told, two weeks after her son's death, that his body had not been cremated, despite her having paid an undertaker in full to do so and despite her belief that it had already been accomplished, and that the undertaker would continue to hold the body until the mother paid a fifteen months' old balance on her late son-in-law's funeral bill.<sup>56</sup> Substantial damages

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can so charge him. See also *Konency v. Hohenschuc*, 188 Iowa 1075, 173 N.W. 901 (1919) for an illustration of an undertaker's reliance on the apparent authority of those having custody of the corpse.

<sup>51</sup> A defense, similar in part, was urged in *Hale v. Brown*, 84 Ariz. 61, 323 P.2d 955 (1958), but was not decisive.

<sup>52</sup> *Ibid.*

<sup>53</sup> See *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 656, 175 S.E. 137, 139 (1934).

<sup>54</sup> *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934).

<sup>55</sup> *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950). See also *Sworski v. Simmons*, 208 Minn. 201, 293 N.W. 309 (1940). And compare *Southern Life & Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925) with *Jefferson County Burial Society v. Scott*, 218 Ala. 354, 118 So. 644 (1933). In *Southern*, a father was held entitled to damages for vexation and distress of mind (though not for mental anguish) because a life insurance company's agent refused to surrender a death certificate necessary for the son's burial; in *Jefferson County*, based on the complaint in *Southern*, a mother was denied recovery for the wrongful detention of her daughter's body.

<sup>56</sup> *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299 (1925). See also *Jordan Undertaking Co. v. Asberry*, 230 Ala. 97, 159 So. 683 (1935).



are proper in these cases because the rule barring recovery for mental anguish from a negligent breach of contract does not extend to purely tort actions where the wrongful act reasonably implies malice or where, from entire want of attention to duty or great indifference to the persons, property, or rights of others, enough malice will be imputed as would justify the assessment of exemplary or punitive damages.<sup>57</sup> In commenting on such commercial usages, the Washington Supreme Court has said:

[I]t is hard to conceive of more refined cruelty and wilful wrong than that which the evidence shows was practiced in this case. It is doubtful if any threat could be more calculated not only to compel payment of the debt, but also to produce mental anguish and suffering, and it was thought that by first creating the suffering payment would follow to put an end to the mental torture.<sup>58</sup>

Law being a Janus-like creature,<sup>59</sup> other courts have rejected claims for mental suffering based on similar facts. The behavior of a funeral director, in Mississippi at least, does not imply malice if he collects payment for funeral services from the decedent's mother and then, on her request to deliver the fully accoutered body to her home for a wake, he refuses to do so until she pays an extra 17 dollars for a tie, gloves, and other accessories meant to enhance the corpse's appearance. The undertaker's demands are not unreasonable or oppressive, since he could well believe that the mother, who already paid him 200 dollars, still had funds left from a life insurance policy worth 420 dollars.<sup>60</sup> Elsewhere, an undertaker has been given a dispensation to lie about his reasons

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<sup>57</sup> *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950).

<sup>58</sup> *Gadbury v. Bleitz*, 133 Wash. 134, 138, 233 Pac. 299, 300 (1925). The defendant sought to excuse himself by explaining that nothing worse was done with the body than retaining it in the "slumber room."

<sup>59</sup> Janus was a two-faced Roman god whose insignia were the key which opens and closes doors, and the stick with which porters drove away those who had no right to cross the threshold. His earlier name was Chaos. See LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY 214 (1959).

<sup>60</sup> *Arnold v. Spears*, 217 Miss. 209, 63 So. 2d 850 (1953). The court distinguished this situation from that in *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950) by stating that the wrongful act in *Kirksey* implied malice while the act here did not. This defendant did nothing calculated to cause the mother to suffer mental anguish, nor did his acts amount to a wilful, wanton, and reckless disregard of her rights. When the mother paid the additional charges, she did so voluntarily. Cf. *Crawford v. Larson*, 216 Minn. 417, 13 N.W.2d 137 (1944), where a son was held liable for the balance due on his mother's casket, despite his counterclaim alleging damages because of the funeral director's refusal to go on with the interment until the bill was paid. What makes *Crawford* a proper decision is that the funeral directors did not detain the body and that there had been a planned delay of several months between the time the casket was placed in a vault and its scheduled interment, so that the son had fair opportunity to settle the account.

for not permitting a widow to view her husband's remains.<sup>61</sup> Declaring that the undertaker apparently obtained the body from the decedent's employers or the public authorities after an accidental explosion and fire, that he had no reason to believe the funeral would be conducted from his mortuary, and that there was no contract, express or implied, calling on him to expose the body to view, the court permitted him, without penalty for the widow's mental distress, to falsely tell her the body was charred beyond recognition. The undertaker may have acted from a sense of solicitude for the widow's feelings. "But," insisted the court, "whatever the reason advanced, whether simply a matter of mistaken opinion, or false, since plaintiff was claiming a right she did not enjoy, the defendant may not be made to respond in damages by reason thereof."<sup>62</sup> The widow was entitled to a return of the body in its condition at death, yet the court apparently felt that embalming either made no change in the final condition or was not equivalent to mutilation, and that the right to have the body in a particular condition did not include the lesser right to inspect it to see if the body's temporary custodian had violated that right. And so, when the widow had the body exhumed, Truth crushed to earth *did* rise again as the poet had predicted, but Error, far from writhing in pain and dying among his worshippers, received judgment and costs.

In concluding this section on an undertaker's liability for his intentional acts, it is useful to compare similar acts independently performed by an undertaker and a member of another profession, to determine whether liability arises because of the act itself or the status of the person who committed it. We would agree that certain causes of action, like battery, rarely depend for their success on the manner in which the defendant earns his living. By contrast, the things one man can publicly say about another with impunity depend very much on whether an attorney-client relationship exists between them. We run into difficulties in those intermediate areas where a relationship does appear but its extent is vague. Can we, for example, decide the validity of a lawsuit based on the unauthorized publication of a dead person's photograph, unless we know who the parties are?

When the parents of a fifteen year old girl killed in an automobile accident sue a newspaper for mental anguish stemming from publica-

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<sup>61</sup> *Infield v. Cope*, 58 N.M. 308, 270 P.2d 716 (1954).

<sup>62</sup> *Id.* at 313, 270 P.2d at 719. This was a 3-2 decision, lacking written dissents. See also *The San Francisco Examiner*, Jan. 18, 1964, p. 1, cols. 4-6, for a news story on the burial of a United States Army sergeant who had been killed by a Panamanian sniper and was being interred in Arlington National Cemetery. His widow "barely got to the cemetery in time for a last look at his body and for that look had to pay a funeral home cosmetician \$25 on the spot."

tion of a photograph that depicted her features in a deformed and hideous manner, should they recover damages? Not according to the Massachusetts Supreme Judicial Court, which recognized that one who intentionally mistreats a dead body is liable in tort to the family member entitled to dispose of the body, but added that the newspaper photographer's act no more interfered with the parents' possession than did the gaze of a curious bystander who witnessed the death, and that no right of privacy was invaded.<sup>63</sup> The decision appears to be wise, however distressed we might be that someone dear to us will be pictured in death agonies for an amused readership. We understand, though often grimly, that the social interest in giving newspapers freedom to accurately portray events—perhaps in behalf of a highway safety campaign—makes us vulnerable when the public becomes curious about our own lives. Our right to privacy covers far less ground than our desire for emotional peace.

Should we reach the same decision if a widow, asking for no undue publicity or notoriety, hires an undertaker to fly her husband's body from one city to another during stormy weather and the undertaker, successfully completing his mission, then has a newspaper advertisement published with a photograph of the body moved from the airplane to the hearse, a caption identifying the decedent and his widow, and laudatory comments on the undertaker's accomplishment? Like the Colorado Supreme Court,<sup>64</sup> I consider this conduct actionable in a suit for the widow's humiliation, mental suffering, and agony. As the court noted, written contracts are rarely made with funeral directors. Because there is neither the time nor the mental tranquility essential to ordinary negotiations, the agreements are usually oral and much is necessarily left to implication. While bereavement encourages sketchy bargains, the survivors still suffer agony akin to torture when they encounter callousness, indifference, insult or indignity.

So true is this that the chief asset of a mortician and the most conspicuous element of his advertisement is his consideration for the afflicted. A decent respect for their feelings is implied in every contract for his services. If this be not true, there is nothing to prevent the embalming of a body and the parading of it through city streets, exposed to the gaze of curious throngs, while a hired crier calls attention to it as an example of the undertaker's skill. Certainly no stipula-

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<sup>63</sup> *Kelley v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951). The court recognized that other jurisdictions hold similar complaints valid as stating an invasion of the right to privacy. See also PROSSER, *TORTS* 641-44 (2d ed. 1955).

<sup>64</sup> *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932). Two judges dissented on procedural grounds not relevant here.

tion need be made in the contract of employment to protect relatives of the deceased from such an outrage.<sup>65</sup>

We might try to distinguish our examples by urging that a news photograph differs in kind from a paid advertisement, proclaiming that an advertiser's notices are somehow more galling than journalistic efforts to achieve a large enough circulation to attract those very advertisers. But most certainly we will return to a comparison of the duties owed to a decedent's surviving relatives by a newspaperman and a hired undertaker. The newspaperman's duties, like those of an undertaker who is a stranger to the survivor, are duties of the public at large; much greater obligations fall on the undertaker who has agreed to manage the funeral arrangements. On the hired funeral director falls the ordinarily remunerative job of contributing to the survivors' peace of mind, a duty best stated in the negative: he must not aggravate the survivors' grief by wilful<sup>66</sup> acts which he was in a position to commit because of his liberty to approach the corpse, or which were calculated to annoy, oppress, or humiliate the survivors. He has these duties because he actively sought them out. Since mental anguish is the only substantial damage to arise from violations of that responsibility, the funeral director should be prepared to make financial amends for any added distress he causes.

### *Liability for Negligent Acts*

We might agree that a funeral director should be forced to pay for his wilful acts, and yet feel he should escape liability on a showing

<sup>65</sup> *Id.* at 547-48, 17 P.2d at 536-37. The court further said that the stipulation against undue publicity or notoriety left no doubt of the undertaker's bounden contractual duty to do nothing to outrage the feelings of an ordinary person or unnecessarily inflict humiliation, mental suffering, and agony. Citing *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913), the court held that damages were available for mental suffering because the undertaker's breach of contract involved wilful, wanton, or insulting conduct. Among the widow's allegations was her complaint that the community believed she was paid to let the picture be taken and circulated. Cf. *Leavey v. Cooney*, 214 Cal. App. 2d 497, 29 Cal. Rptr. 580 (1963), which allowed damages for a deputy district attorney's humiliation and embarrassment caused by the defendants' breach of contract in distributing a motion picture to motion picture theatres, rather than limiting it to television showings. The district attorney, who had prosecuted Caryl Chessman, agreed to appear in a filmed dramatization of Chessman's trial and imprisonment, but refused to do so unless distribution was specifically restricted. Explaining to the movie producer that he had never made a dime out of any case in which he took part, the prosecutor insisted he was not now going to make it appear that he had. The producer agreed to these terms but later reneged and had the film widely distributed. That deliberate act justified the damages awarded, since the public would think the prosecutor was being compensated for his participation in the film and he would be subjected to severe criticism.

<sup>66</sup> Whether negligent acts should also lead to recovery is discussed in the text at notes 67-104.

that the survivor's grief was caused by nothing more serious than negligence. Taking such a position, we would assert that an undertaker suffers no liability for emotional harm when he so carelessly and negligently embalms a corpse that his bungling causes mortification to the surviving husband,<sup>67</sup> though we would, presumably, charge him fully for the ordinarily probable effects of his negligently driving a hearse. We might commend the reasoning of the Wisconsin Supreme Court, which said:

It is obvious that in mere negligence there is no intent to offer indignity to, or wound the feelings of, another; and it may be legitimately said, as a matter of law, that such result from mere inadvertance is so remote and beyond ordinary probabilities that there exists no proximate causal relation between the two, unless a physical injury is caused, out of which, in natural sequence, arises mental, like physical, pain.<sup>68</sup>

But on analyzing this statement we should wonder how much it says. That in "mere negligence" there is no "intent" to do harm is fundamental tort law, and is therefore "obvious." Liability, however, finds a peg in the offending party's failure to meet a standard required by circumstances, by his own capabilities, and by his relationship to the injured person. Once we measure the extent of the duty and discover a breach, we hold a party liable for the harm he caused. In spite

<sup>67</sup> See, e.g., *Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541 (1941), which held that the undertaker did face limited liability for breach of contract. See also *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960), which reversed a dismissal in favor of a municipal cemetery because the city's acts in disinterring the body of a child might reasonably be considered wilful and wanton; *Arnold v. Spears*, 217 Miss. 209, 63 So. 2d 850 (1953); *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10 (1950), which recognized that courts are in hopeless conflict on the issue of mental pain as a proper element in damages; *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. Sup. Ct. 1950), which reaffirmed the rule against recovery for mental pain unconnected with physical injury in an action arising from negligent breach of contract, but refused to extend the rule to purely tort actions implying malice or great indifference; *Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927), which supported the rule as to negligence, but allowed recovery for wilful, wanton, fraudulent, reckless, or grossly negligent acts; *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299 (1925), which allowed recovery on the basis of a wilful wrong, but recognized that precedents would not support an action for simple negligence; *Nail v. McCullough*, 88 Okla. 243, 212 Pac. 981 (1923); *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172 (1918); *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 114 N.W. 353 (1907); *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900); *Grill v. Abele Funeral Home, Inc.*, 69 Ohio App. 51, 42 N.E.2d 788 (1940); *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913); *Norton v. Kull*, 74 Misc. 476, 132 N.Y.S. 387 (1911); *Mauger v. Gordon*, 22 Ohio Ops. 436, 7 Ohio Supp. 98 (1941), which said that if the rule against recovery is obsolete, it should be abandoned by a reviewing court, rather than one at the *nisi prius* level.

<sup>68</sup> *Koerber v. Patek*, 123 Wis. 453, 465, 102 N.W. 40, 44 (1905), which reversed the sustaining of a demurrer because the decedent's son alleged more than negligence in charging the defendant with refusing to return his mother's stomach for burial.

of the court's implications, negligence is a term of blame rather than praise.

To say that a result was "remote and beyond ordinary probabilities" is to say that it was unexpected. Surprise at reality, however, differs from actual causal relation. As Helen Palsgraf, that unwilling progenitor of so much legal discord, discovered, an event may be a substantial factor in producing harm through a natural and continuous sequence from act to injury, and yet be sheltered from legal consequences because the act performed had no foreseeable relationship to the harm that occurred.<sup>69</sup> The "scope of the risk" advocates *do* agree that the questioned conduct triggered the harm. If, for example, Mrs. Palsgraf had been insured against the risk of personal injury from objects thrown down by explosions, the insurer would be bound to compensate her.<sup>70</sup> But, except for such unique relationships, the "scope of the risk" school insists that legal cause is different from physical cause (and for "legal cause" we may substitute "proximate cause" or "legal liability" or "liability of commerce and industry" or "judicial fear that commercial and industrial timidity because of potential exposure to harm claimed by unknown parties from unknown causes would cause social progress to end"<sup>71</sup>). This being so, a statement that remoteness precluded proximate causation, applied to funeral directors, means that as a matter of law a reasonable undertaker could not have foreseen during the time he was inattentive to duty that his negligence would excite mental anguish in the decedent's kin.<sup>72</sup>

We might add to this viewpoint denying liability the words of the Minnesota Supreme Court: "A breach of contract involves only such consequences as directly result therefrom and were within the contemplation of the parties when the contract was made, and which may be measured and determined by some definite rule or standard of compensation."<sup>73</sup>

Consequences "measured and determined by some definite rule or standard of compensation"—what does that mean? In seeking equitable remedies, a party is likely to claim that his potential dam-

<sup>69</sup> *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>70</sup> *But see* PROSSER & SMITH, *CASES & MATERIALS ON TORTS* 364, n.1 (3d ed. 1962), noting that a study of the *Palsgraf* record "indicates that as described in the opinions, the event could not possibly have happened."

<sup>71</sup> See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963); *Ryan v. N.Y. Cent. R.R.*, 35 N.Y. 210 (1866).

<sup>72</sup> *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905), quoted in the text at note 68, does say that proximate cause exists when physical injury results. How does subsequent physical harm relate back to foreseeability creating duty at the time of the disputed act? See also the text at notes 45 and 96-99.

<sup>73</sup> *Beaulieu v. Great Northern Ry.*, 103 Minn. 47, 52-53, 114 N.W. 353, 355 (1907).

ages are of such a nature money recompense would do him little good. Adamantly, he denies the possibility that his injuries fall within some definite standard of compensation. He urges this position, not from a moral impulse to confess the illegitimacy of his cause, but to qualify for extraordinary relief. When he succeeds in convincing the court that his loss would be unique, he benefits from equity's imaginative patronage. Are we thus to say that a party who has not yet been harmed is more favored than one who appears tearful, grief stricken, and emotionally distraught because of already-executed carelessness? Or are we saying that we would have eagerly prevented the mental anguish if asked to do so in time but, having been denied that chance, now consider money damages inappropriate<sup>74</sup> or unmeasurable?<sup>75</sup>

As to the suggested inappropriateness of dollars and cents damages, we must accept the fact that Anglo-American jurisprudence, wrought from centuries of common law expedients and statutory maneuvers, has evolved no better answer for its daily round of lamentations than favoring an aggrieved party with a money judgment and an implied wish that he can collect it. In our system of substituted reparation we cannot do otherwise—unless we refuse to do anything at all. Why a wrongdoer should benefit from this judicial crisis is perplexing. Once a plaintiff makes his prayer for the best relief available, appropriateness should no longer be an issue. Had he looked upon the remedy as undesirable, he would never have filed the complaint.

As to the claimed unmeasurability of damages for mental anguish, we should promptly acknowledge that courts have found a passable measure in cases based on assault, a right to privacy, alienation of affections, seduction, abduction, malicious conduct, wilfulness, wantonness, and intentional infliction of emotional harm, even when liability for emotional harm arising outside these categories is rejected.<sup>76</sup> Our judicial records also make clear the possibility of calculating damages for a schoolteacher whose face was scarred;<sup>77</sup> for an injured mongoloid child, twenty three months old, based in part on the extent to which the injury will hinder him in leading whatever normal life he would otherwise have been competent to lead;<sup>78</sup> for a singer who had never performed as a "lull" act but would have done so if her finger

<sup>74</sup> See text at note 28.

<sup>75</sup> Let us in passing note the difference, despite dictionary interchangeability, between "unmeasurable" and "immeasurable." Who would consistently deny recovery for *immeasurable* harm?

<sup>76</sup> See *Mauger v. Gordon*, 22 Ohio Ops. 436, 7 Ohio Supp. 98 (1941). See also *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); PROSSER, *TORTS* 40-46 (2d ed. 1955).

<sup>77</sup> *Bethke v. Duwe*, 256 Wis. 378, 41 N.W.2d 277 (1950).

<sup>78</sup> *Miami Paper Co. v. Johnston*, 58 So. 2d 869 (Fla Sup. Ct. 1952).

had not been injured;<sup>79</sup> and for a thirteen month old child whose hands were cut off by a locomotive, provided the jury considered whether a person who loses his hands in infancy is likely to feel the same sense of humiliation as one who sustains this loss in later life.<sup>80</sup> The jury tallies the value of harm without measuring the pecuniary worth of pain and suffering by the hour, the day, or the week,<sup>81</sup> nor by setting a price at which someone else would willingly endure the same pain the victim had suffered.<sup>82</sup> What the jurors must use is their common sense, regulated by the evidence and superintended by the trial judge and, as necessary, an appellate court. For those who condemn this procedure because of its shortcomings, I submit that the jury's mathematical inadequacies deserve less abuse than the wrongdoer's failure to have avoided the original harm. The chance of an excessive or inadequate award is similar in kind to, and not significantly different in degree from, the chance that occurs in every case where the wrongdoer has caused damage which lacks a fixed catalogue value.<sup>83</sup>

We have remaining, then, the questions of whether the prevention of mental anguish was in the parties' original contemplation when

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<sup>79</sup> *Benshetler v. Palumbo Motors*, 380 Pa. 353, 110 A.2d 207 (1954). A "lull" act is the trade term for a singer who accompanies herself.

<sup>80</sup> *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948).

<sup>81</sup> See *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958).

<sup>82</sup> See *Loftin v. Wilson*, 67 So. 2d 185 (Fla. Sup. Ct. 1953).

<sup>83</sup> Underlying much hostility towards mental suffering litigation is a judicial (but not necessarily judicious) fear of attorneys, plaintiffs, and jurors. As has been said: In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance; but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice.

*Huston v. Freemansburg*, 212 Pa. 548, 550-51, 61 Atl. 1022, 1023 (1905). Yet this attitude exemplifies a belief that our judicial system has failed. Perhaps it has. Perhaps Machiavellian attorneys, deceitful clients, and gullible jurors systematically unite to rob innocent defendants of their hard-earned gains and terrorize upright judges with precedents from benighted jurisdictions. If this were true, surely our efforts would require a change in the administration of justice, the fact-finding and law-applying machinery, and not just a haphazard singling out of individual causes of action as inducements to rascality. In noting with disapproval that the action for negligence overtops all others in frequency and importance, the court avoids describing the litigation it considers most important or deserving of periodic repetition. Would it prefer breach of contract actions? Divorce? Homicide? Or, with its reference to opening the door, does the court mean that the best litigation is the least litigation? By what ordered system would we then give every man his due?



their agreement was made,<sup>84</sup> and whether the negligence was of the sort reasonably calculated to have produced the result it did for the injured party.<sup>85</sup> If so, the funeral director should be held liable for the mental suffering which his negligence has caused. If not, he should be protected by the general rule barring recovery for those damages stemming from a negligent breach of contract.

Rather than open our discussion with death, we should hearken to another common event which most participants view somewhat less apprehensively: marriage. Planning to marry a man of wealth and high social standing, of the same rank to which she herself belonged, a young woman had her mother telegraph New Orleans' most fashionable clothiers to furnish five dresses as her bridal gown and trousseau. All the gowns were due before her wedding day. Unfortunately, the wedding dress, which arrived first and "should have been a thing of beauty, delightful to a young bride to wear," proved to be too short. Overcome by disappointment and chagrin, the bride-elect took to her bed. Telegrams of complaint to the clothiers led to their refusal to send the other four dresses. The young woman, who was absolutely counting on having them, found herself ill-equipped for the entertainments incidental to her wedding and so, after having declined all invitations in the several cities she visited, discontinued the bridal tour. She then brought suit against the clothiers for her mortification and humiliation because of their failure to send the four sought-after dresses. Judgment in her favor was affirmed on appeal.<sup>86</sup>

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<sup>84</sup> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854).

<sup>85</sup> "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is a risk to another or to others within the range of apprehension." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). See also *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

<sup>86</sup> *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903); followed in *Mitchell v. Shreveport Laundries*, 61 So. 2d 539 (La. Ct. App. 1952), which allowed a prospective bridegroom to recover damages for his embarrassment, humiliation, and mental distress caused by a laundry's failure, after full disclosure of his need for prompt service, to return his "good" suit in time for his wedding. As a result, he had to attend the wedding ceremony in his "other" suit, which was soiled and unkempt. The laundry unsuccessfully urged that plaintiff's embarrassment was caused by his frugality in owning only one good suit of clothes and in failing to disclose this fact to its agent. *But cf. Eller v. Carolina & W. Ry.*, 140 N.C. 140, 52 S.E. 305 (1905), an action against a railroad for negligently damaging a prospective bride's trousseau, dismissed because the bride tried

Making it clear that the general rule limited damages to the pecuniary loss sustained or gain prevented, the court recognized that some contracts were meant to gratify an intellectual enjoyment in religion, morality, or taste, or some convenience or other legal satisfaction. Although these agreements are not valued in money by the parties, damages are still due after a breach. The clothiers must have known that if the dresses remained unfinished by the wedding day the bride would be keenly disappointed. In gauging her disappointment, the jury properly took into account the fact that planned entertainments were given up and that she was humiliated in going to her husband without a suitable trousseau.

This controversy, though charming, should be treated more like stern precedent than a trivial anecdote.<sup>87</sup> With sound reasoning and application it yields a compelling point: In certain recognized circumstances, those who bargain for goods and services do so because they have confronted an outstanding event which needs a capable practitioner, familiar with such proceedings, to guide it to its fullest realization of sorrow, dignity, or joy. Far more than in ordinary circumstances (or at least more generally acknowledged to be so), the goods or services are a means, secondary in themselves, of achieving emotional gratification from the event. When the supposedly qualified practitioner negligently fails to carry out the bargain, he destroys something greater than he alone could have provided or charged for. He destroys emotional peace.

Most avoidable emergencies, of course, upset us. Is our sorrow customarily to receive monetary balm from those persons with whom we had business relationships in the past and whose carelessness contributed to our current plight?<sup>88</sup> Certainly not. The fiery destruction of a barn due to a faulty hot water heater may bring grief and psychic trauma, yet by no stretch of the imagination is a contract to install the appliance intended to gratify some intellectual enjoyment which, when frustrated, gives rise to mental anguish that could have been foreseen.<sup>89</sup>

to split her cause of action by settling for property damages and then suing for mental anguish.

<sup>87</sup> For example, *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903) was cited in *Westervelt v. McCullough*, 68 Cal. App. 198, 228 Pac. 734 (1924) (a wrongful mortgage foreclosure case), which in turn was relied on in *Chelini v. Nieri*, 32 Cal. 2d 480, 196 P.2d 915 (1948) (an undertaker's breach of contract case), which in turn controlled *Carew v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959) (another undertaker's breach of contract case).

<sup>88</sup> The words "business relationships" are significant, meant to distinguish this class of cases from those where the parties have had no dealings other than through an alleged tort. See text at notes 99-102.

<sup>89</sup> *Sahuc v. U.S. Fidelity & Guaranty Co.*, 320 F.2d 18 (5th Cir. 1963). See also *Preece v. Baur*, 143 F. Supp. 804 (D.C. Idaho 1956), which struck allegations seeking

Nor does a railroad become liable for refusing to guarantee that a son anxious to see his dying father will make proper train connections at a distant town, since the railroad had not contemplated a distinction between the son's natural anxiety for his father and his nervous impatience at being detained at the expected place of departure.<sup>90</sup> For liability arising from negligent handling of a telegram which was meant to announce death or near-death, courts are divided, a minority insisting that damages should be available for a breach that does not seriously affect a man's pocketbook but "does relate to his feelings, his emotions, his sensibilities—those finer qualities which go to make the man."<sup>91</sup> Most courts dealing with negligently managed messages, however, assert that "The law looks only to the pecuniary value of a contract, and for its breach awards only pecuniary damages."<sup>92</sup>

damages for a father's mental anguish caused when defendant's electric range and hot water heater set the father's home afire while his children were sleeping upstairs. And see *Sullivan v. H. P. Hood & Sons*, 341 Mass. 216, 168 N.E.2d 80 (1960), which denied recovery for mental anguish, unaccompanied by injury from without, to a woman who had drunk milk spiced with the fecal matter of a dead mouse, which was also in the milk carton.

<sup>90</sup> *Wilcox v. Richmond & D. R. Co.*, 52 Fed. 264 (4th Cir. 1892). Though stating it was a moot question on this record as to whether breach of contract actions could lead to recovery for emotional distress, the court said that damages cannot be recovered for disappointment and mental suffering alone. It registered disapproval of the son's claimed damages because he did not allege any pecuniary injury "such as the loss of an expected legacy." *Id.* at 266. *But cf.* *Birmingham Transfer & Traffic Co. v. Still*, 7 Ala. App. 556, 61 So. 611 (1913), which allowed a father to recover damages for mental suffering because the defendant transfer company carried his child's small coffin like ordinary baggage, piled in a dray with seven or eight trunks and with two men sitting on the cargo. The court held that the transportation agreement contained a necessary implication, violated here, that the company would move the body in a suitable and befitting manner. For other cases involving mental anguish because of the negligent transportation of a corpse, see *Beaulieu v. Great N. Ry.*, 103 Minn. 47, 114 N.W. 353 (1907), which rejected a right to recovery; and, supporting that right, *Louisville & N. R.R. v. Hull*, 113 Ky. 561, 68 S.W. 433 (1902), which approved the cause of action but reversed a judgment for plaintiff because of his attorney's inflammatory closing argument (*e.g.*, "That shows how railroads do. They are exceedingly accommodating when there is any money in sight. They will hold a train an hour for a negro minstrel show, but it could not hold its train three minutes to get a corpse on the train. There was no money in that." *Id.* at 573, 68 S.W. at 435); *Hale v. Bonner*, 82 Tex. 33, 17 S.W. 605 (1891); *Missouri, K. & T. Ry. v. Linton*, 109 S.W. 942 (Tex. Civ. App. 1908), which reversed a judgment for plaintiff because of improper testimony from a witness who could not know or distinguish between a mother's natural grief for the loss of her son, which was not a proper element of damages, and any disappointment the mother might have felt from a delay in shipping her son's remains.

<sup>91</sup> *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 762, 62 N.W. 1, 4 (1895).

<sup>92</sup> *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N.W. 1078 (1894). Referring to the "Texas doctrine," which allowed damages for mental anguish, the court observed: "The 'Texas doctrine' has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book-

So imbedded as precedent are the telegram cases that we must make a factual determination before proceeding further. If telegrams are exactly like funerals,<sup>93</sup> the negligent handling of a corpse will lead in most jurisdictions to no recovery for pure mental anguish. Are there, then, any significant differences between them? Telegraph companies serve people who for one reason or another wish to transmit information without using the telephone or writing letters. The messenger service must accommodate dispatches containing business data, greetings, social information, condolences, and as wide a variety of sentiments as can be expressed by words on paper. The situations in which the companies are vulnerable (or arguably should be vulnerable) to lawsuits based on emotional distress are those where a sender has informed a telegraph agent of the message's urgency, or the contents clearly spell out an emotionally-charged event. But even there the substantive contents of the messages do not require unique mechanical handling; the same wires which carry messages about grain futures carry pleas for an errant son to come home because his father is dangerously ill. Assuming that the telegraph company makes no special promises about handling a particular telegram, the treatment of the messages is neutral with respect to time, place, and manner of delivery. The companies are not asked to determine whether recipient A should be made to wait until recipient B's message is delivered, nor whether an ambiguous phrase has mortal significance. Because of the nature and scope of the companies' operations and the comparatively few times mental suffering is likely to occur to a substantial degree (as opposed to ordinary annoyance whenever plans go awry), we are willing to make a socially valuable choice. We prefer to have a relatively cheap means of transmitting speedy messages to a cautious system in which the companies take all possible precautions, with attendant delays, to protect themselves from premium verdicts. We penalize fault for its most common result, pecuniary damage, and leave unremedied those claims, however worthy, that would intimidate our communications network into overly-guarded service.

For the funeral industry these considerations are beside the mark. Only one subject, death, brings customers to utilize undertaking estab-

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makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that newspapers are anxious for the latest news." *Id.* at 263, 59 N.W. at 1080.

<sup>93</sup> "An elephant can be identified as a sunflower—both have long stems. A camel is indistinguishable from a peanut—if only their humps be considered. . . . [But] no logician would be satisfied with identifying a peanut as a camel, because both have humps: he demands accessory agreement—that both can live a long time without water, for instance." FORT, *THE BOOK OF THE DAMNED* 62-63 (1919; Ace Star ed., ca. 1962). Oliver Wendell Holmes, Jr. was "one of the greatest Forteanes." *Id.* at 10.

ishments. The funeral directors' dual focus is on the physical disposal of human remains and a measure of comfort for the survivors.<sup>94</sup> While an individual agreement with a funeral director may emphasize disposal rather than sympathy, the usual arrangements stress concern for the mourners. As the president of a national morticians' group has written in defense of current mortuary practices:

The families are striving to express their grief, their personal sense of the appropriate, as best they can in the harrowing, tragic days of a most complex religious, social and emotional crisis. They need all the help, encouragement and sincere interest that anyone can give them—not criticism for failure to conform to something of which they have no knowledge or experience.<sup>95</sup>

When the families, purse in hand, turn to the funeral industry for part of this help, encouragement, and sincere interest, is there any doubt about what the undertakers are expected to achieve? If the survivors' emotional tension becomes aggravated by an undertaker's negligence, should courts as a matter of law rather than individual contract deny recovery for the superimposed grief? In my opinion, no. Yet courts have done so, reasoning that mental anguish cannot be treated as an independent ground of damages to support an action for that injury alone,<sup>96</sup> or that a passive breach of contract, though amounting to negligence, does not create liability in the absence of wantonness, wilfulness, or insult.<sup>97</sup>

Taking these positions requires the courts to consider mental anguish as a result somehow unrelated to the original funeral agreement, when in fact this anguish is the direct counterpart of the commodity, emotional equilibrium, which formed the subject of the contract. What courts have said in denying recovery would apply to an undertaker's suit for mental anguish because a survivor negligently failed to pay his bill. The undertaker bargained for a particular price to be paid at a particular time. His damages relate directly to his expectations, which were pecuniary ones. The ordinary survivor's expectations were different. For him, the essence of the contract was a reasonable expectation of dignity, tranquility, and personal consolation (although a jury in any individual case might find he had struck a different bargain). To say that these expectations, when carelessly disappointed,

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<sup>94</sup> Subsidiary activities do exist. At a price per copy of approximately sixty cents, for example, Forest Lawn Memorial Park of Los Angeles sells a coloring book about itself.

<sup>95</sup> See the letter from W. L. Busterud, President, National Selected Morticians, N.Y. Times, Sept. 28, 1963, p. 18, cols. 4-5.

<sup>96</sup> *Nail v. McCullough & Lee*, 88 Okla. 243, 212 Pac. 981 (1923).

<sup>97</sup> *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913). *Accord*, *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172 (1918).

were foreign to the agreement is to declare that the survivor bought no more than a box and a hole in the ground. To say that the expectations have no monetary value is to deny that the contract ever could have been written in the first place—else how could the funeral director price his services? Surely a more accurate view of these agreements comes from the North Carolina Supreme Court:

The tenderest feelings of the human heart center around the remains of the dead. When the defendants contracted with plaintiff to inter the body of her deceased husband in a workmanlike manner they did so with the knowledge that she was the widow and would naturally and probably suffer mental anguish if they failed to fulfil their contractual obligation in the manner here charged. The contract was predominantly personal in nature and no substantial pecuniary loss would follow its breach. Her mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part. It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made.<sup>98</sup>

Not only was the potential harm within the parties' contemplation but, more fundamentally, the parties themselves were in each other's contemplation, even when the closest survivor had a representative make the detailed arrangements for him.<sup>99</sup> The survivor's rights to recovery are therefore undisturbed by the line of cases rejecting liability for a bystander's emotional anguish at seeing injury befall a third person outside the bystander's range of peril.<sup>100</sup> A survivor is not a

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<sup>98</sup> *Lamm v. Shingleton*, 231 N.C. 10, 15, 55 S.E.2d 810, 813 (1949), which also said that when the defendants, who held themselves out as specially qualified to perform the duties of an undertaker, agreed to conduct the funeral, they impliedly covenanted to perform the contemplated services in a good and workmanlike manner. A dissenting judge argued that the widow had contracted to have the body buried in a specific way, *i.e.*, in a watertight vault, and should be entitled to show this breach, rather than be limited to a showing that the burial was not done in a workmanlike manner. Other cases allowing recovery for mental anguish because of the nature of the funeral agreement include: *Chelini v. Nieri*, 32 Cal. 2d 480, 196 P.2d 915 (1948); *Brown Funeral Homes & Insurance Co. v. Baughn*, 226 Ala. 661, 148 So. 154 (1933); *Renihan v. Wright*, 125 Ind. 536, 25 N.E. 822 (1890); *Baumann v. White*, 234 N.Y.S.2d 272 (Sup. Ct. 1962); *Carew v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959); *Taylor v. Bearden*, 6 Tenn. C.C.A. 33, 34 (1915), which noted, "this is a singular lawsuit, but its novelty is not sufficient to repel the one who brought it."; *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855 (1914). See also *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172 (1907), which states that an action based on wrongful and improper burial may be considered a tort.

<sup>99</sup> See note 50.

<sup>100</sup> See, *e.g.*, *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963), where the court by a 4-3 vote ruled that a pregnant mother

bystander. He has quasi-property rights in the corpse different from any rights a bystander may claim in the injured person.<sup>101</sup> If the roots of liability for negligence require that the wrongdoer must have owed an original duty of care to the person injured, or to the class of which the injured person is a member,<sup>102</sup> these duties to the survivor were established by the funeral agreement. Negligence, though usually a tort term, is equally applicable to show breach of a contract in which reasonable standards are implied.<sup>103</sup>

Even when these propositions are accepted as a groundwork for liability, the survivor claiming damages must nevertheless overcome formidable challenges before he can justify his position. He must show either that the funeral director was negligent, having fallen away from reasonable standards in the carrying out of his assignment, or that the funeral director failed to produce the results he had promised in the original agreement.<sup>104</sup> More than that, the survivor must show a proper

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failed to state a good cause of action in seeking damages for her mental distress at seeing a truck run over her seventeen month old son. The minority position, however, which would have favored the mother, actually represented the views of a majority of the court's permanent members, one of whom could not hear this appeal because he had written the district court of appeal decision in the same case. See also *Lahann v. Cravotta*, 228 N.Y.S.2d 371 (Sup. Ct. 1963), which similarly rejects a bystander's right to recover.

<sup>101</sup> As the dissenting opinion in *Amaya v. Home Ice, Fuel & Supply Co.*, acidly notes: "Recovery for emotional disturbance resulting from abuse of a dead body is hardly consistent with denial of recovery for emotional distress of a mother who witnesses a child's injury or loss of life. Is the contemplation of injury to the corpse more disturbing than that of the injury which may cost a child its life?" 59 Cal. 2d 295, 325 n.5, 29 Cal. Rptr. 33, 52 n.5, 379 P.2d 513, 532 n.5, quoting the opinion of Justice Tobriner, then a member of the district court of appeal, 23 Cal. Rptr. 131, 136 n.5 (1962). This observation, we must remember, was intended to expand liability to include a bystander's recovery, and not to reduce a survivor's damages.

<sup>102</sup> See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963), which gave as an example its belief that extension of liability for negligent driving to spectators who were not themselves in danger would place an unreasonable burden on the highways. Cf. the following cases, which also turned on the absence of a duty to the person claiming mental anguish: *Tyler v. Brown-Service Funeral Homes Co.*, 250 Ala. 295, 34 So. 2d 203 (1948), where a wife sought damages for mental distress because an ambulance service allegedly was negligent in leaving her sick husband unattended; *Brown Funeral Homes Ins. Co. v. Dobbs*, 228 Ala. 482, 153 So. 737 (1934), a case, somewhat confusing to me, where the court found no contract to exist between the surviving wife and the allegedly negligent undertaker; *Thomasson v. Hackney & Mole*, 159 N.C. 299, 74 S.E. 1022 (1912), where the mother of a deceased child became upset because a photography store lost the only films she had of the child.

See also *Brillhardt v. Ben Tipp, Inc.*, 48 Wash. 2d 722, 297 P.2d 232 (1956), which allowed recovery for mental anguish arising from the defendant's continued negligence.

<sup>103</sup> See *Carew v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959).

<sup>104</sup> See *Stahl v. William Mecker, Inc.*, 184 App. Div. 85, 171 N.Y.S. 728 (1918), which denied liability for a surviving widow's mental suffering because the defendant

relation between the funeral director's conduct and the survivor's later complaints, such as the common requirement that the disputed act was a substantial factor in producing the later harm, without the supervening effect of an independent cause. The survivor, in short, must prove his case. For the funeral industry, these principles impose no greater impositions than that of doing its work reasonably well and of living up to its promises—although the industry may now be tempted to promise less.

crematory operator did in fact return the ashes of her husband (as a jury so found), even though a negligent mislabelling of the urn made the widow feel frightful and certain the ashes belonged to someone else. The court said:

I can conceive of no tangible basis for any such allowance of damages. A person may only recover damages for mental suffering which is the natural and proximate consequence of some wrongful act or neglect on the part of the one sought to be charged. Independent of some corporeal or personal injury or breach of duty, there can be no mental suffering for which recovery may be had. [*Citation omitted.*] If the jury had found that the plaintiff had been deprived of her husband's remains by reason of misconduct on defendant's part, then she would have been entitled to damages for injury to feelings proximately flowing from defendant's wrongful acts. But here the jury have specifically found that she has suffered no loss, but, on the contrary, received from the defendant the ashes of her deceased consort. The verdict of the jury destroyed any basis for a recovery of damages for mental suffering.

*Id.* at 92, 171 N.Y.S. at 733.